UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

FOAM CRAFT OF NEBRASKA, INC.
AND APPLIED WORK FORCE
SOLUTIONS, INC.,[1]

Joint Employers,

and Case 21-RC-20129

FOOD, INDUSTRIAL, AND BEVERAGE
WAREHOUSE DRIVERS AND CLERICAL
EMPLOYEES UNION, LOCAL 630,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO,[2]

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was conducted before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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[1] The Joint Employers' names appear as amended at the hearing. The record reveals that Applied Work Force Solutions, Inc. was formerly known as Team Personnel.

[2] The Petitioner's name appears as corrected at the hearing.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Foam Craft of Nebraska, Inc. (herein called Foam Craft), and Applied Work Force Solutions, Inc. (herein called AWFS), are, and each of them is, engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed in the positions of

[3] The record reveals that during the 12 months preceding the date of the instant hearing, a representative period, Foam Craft, a Nebraska Corporation, purchased and received goods valued in excess of $50,000.00, which goods were shipped directly to Foam Craft's Cerritos, California facility from points located outside the State of California. In the same representative period, Foam Craft purchased services valued in excess of $50,000.00 from AWFS.

[4] The record reveals that the Petitioner is engaged in the business of organizing employees for the purpose of collective bargaining with their employers, negotiating collective bargaining agreements with the employers of the membership, and administering and enforcing the collective bargaining agreements so reached.

> production and maintenance, shipping and receiving, and driving, employed by Joint Employers Foam Craft of Nebraska, Inc. and Applied Work Force Solutions, Inc., at the facility located at 16016 Arthur Street, Cerritos, California; excluding all other employees, office clericals, guards, and supervisors as defined in the Act.[5]

The Petitioner contends that Foam Craft is a joint employer along with AWFS[6]. Foam Craft denies that it is a joint employer with AWFS contending that AWFS is the sole employer. There is no history of collective bargaining covering the unit employees.

The record reveals that Foam Craft operates a polyurethane foam cutting plant located in Cerritos, California, the sole facility involved in this proceeding (herein called "the facility"). If Foam Craft has a need for additional employees, Foam Craft contacts AWFS. AWFS then refers AWFS employees to work at the Foam Craft facility.[7] Once there, these AWFS employees work in either the fab area, polyester (fiber) area, shipping and receiving area, or the baling area at Foam Craft's

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[5] Employees hired directly by Foam Craft are not included in the bargaining unit. Administrative notice is hereby taken that, on September 29, 1999, in case 21-RC-20119, the undersigned issued a Certification of Representative, certifying the Petitioner as the exclusive collective-bargaining representative of those employees. The bargaining unit sought in the instant matter consists only of those employees hired by AWFS and referred to Foam Craft. No party contends that the unit sought in the instant case, as amended at the hearing, is inappropriate for collective-bargaining purposes. Accordingly, I find that the wall-to-wall unit sought is presumptively appropriate.

[6] AWFS was served with notice of the instant hearing, but made no appearance.

[7] Employees hired by AWFS who are referred to the Foam Craft facility, will be referred to as "AWFS employees". Employees hired directly by Foam Craft will be referred to as "Foam Craft employees".

facility. Currently, there are approximately 30 AWFS employees that work at the Foam Craft facility on a regular basis.[8] Some of these AWFS employees have been working at Foam Craft since April 1998.

With regard to hiring, the record reveals that AWFS hires AWFS employees. Foam Craft does not interview or screen the AWFS employees that are referred to its facility. When AWFS employees first arrive at Foam Craft, they are assigned to work in a particular department by a Foam Craft supervisor based on the needs of Foam Craft.

Once the employees reach their work area, a Foam Craft supervisor provides initial training for the employees. The initial training for most areas is about 15 minutes, plus the employees receive ongoing review and training. Employees assigned to the fiber area receive some 30 minutes of additional safety training regarding equipment used in the fiber area. These employees also receive follow up training throughout the initial day and week, conducted by a Foam Craft supervisor or lead person.

After an AWFS employee is initially trained, the AWFS employee is placed with an experienced employee who oversees his/her work. The experienced employee could be an AWFS employee or a Foam Craft employee.

[8] The record does not reveal the number of Foam Craft employees working at the facility.

The record reveals that if an AWFS employee needs a day off for vacation, illness, etc., that employee is to inform the Foam Craft supervisor. Although it is uncertain from the record if Foam Craft supervisors have the ability to deny an AWFS employee's request for time off, the record reveals that AWFS employees must notify Foam Craft supervisors of any such request. AWFS employees and Foam Craft employees use the same lunch room and have access to the same common rooms at Foam Craft.

Supervisors for Foam Craft determine the schedules and hours of employment of AWFS employees and Foam Craft employees. The record discloses that Foam Craft supervisors determine the daily work assignments of AWFS employees, and that AWFS has no role in the assignment of work duties for any employees performing work at the facility. Moreover, no AWFS supervisor is present at the Foam Craft facility.

With regard to advancement, the record reveals that AWFS employees have the opportunity to become lead employees at Foam Craft. The record discloses that Foam Craft supervisors determine which employees become lead employees. Nancy Silva, an AWFS employee, testified that she was promoted to a lead position in the fab department, in or about June, 1999. As a lead employee, Silva oversees the work of approximately 10 employees, including both AWFS employees and Foam Craft employees. Silva testified that she was told by her supervisor, Martha Aguilar,

that, as a result of her promotion to lead person, there is a possibility that she can become a Foam Craft employee.

Both AWFS employees and Foam Craft employees work overtime on a regular basis. If only some employees are needed for an overtime project, Foam Craft supervisors can at their discretion choose between either AWFS employees or Foam Craft employees to do the work.

The record reveals that Foam Craft regularly holds safety meetings. These meetings are attended by both AWFS and Foam Craft employees and are conducted by Foam Craft supervisors. AWFS employees are required to follow the same safety rules and regulations as Foam Craft employees.

AWFS employees use timecards that, except for a designation that they are either AWFS or Foam Craft employees, are identical to those of Foam Craft employees. All timecards are stored in the same place and all employees punch the same time clock. Supervisors for Foam Craft collect all timecards and Foam Craft human resources employee Sandra Vega calculates the hours worked by AWFS employees and relays that information to AWFS. If AWFS employees have a dispute regarding the amount of hours calculated, the AWFS employee contacts Vega.

AWFS employees are paid weekly with a check drawn from accounts of AWFS. AWFS delivers the paychecks to the Foam Craft facility where they are distributed to the AWFS employees by a Foam Craft employee. Foam Craft does not make any deductions

from paychecks of AWFS employees and Foam Craft does not provide benefits to AWFS employees, nor does it pay workers' compensation insurance or unemployment insurance for AWFS employees.

The record reveals that if Foam Craft is not satisfied with the performance of an employee referred by AWFS, Foam Craft will contact AWFS, inform AWFS that Foam Craft has an employee they would like to have replaced, and AWFS will replace that employee the same or the following day.

The Board has held that joint employer status exists if two employers exert significant control over the same employees' terms and conditions of employment. TLI, Inc., 271 NLRB 798 (1984), enfd. 772 F.2d 894 (3rd Cir. 1985); U.S. Pipe & Foundry Company, 247 NLRB 139 (1980). The petitioner bears the burden of establishing that the alleged joint employer meaningfully affects matters such as hiring, firing, compensation, scheduling of working hours, and daily supervision. This determination is essentially factual in nature and turns upon the circumstances of the relationship between the two entities. Whitewood Oriental Maintenance Co., 292 NLRB 1159 (1989).

Based on the record and evidence provided, there is substantial evidence to support a joint employer finding. Thus, Foam Craft oversees direct supervision of the work performed by AWFS employees, determines their hours, and sets their schedules. Such actions support a joint employer finding. Flatbush Manor, 313 NLRB 591 (1993); The Brookdale Hospital Medical Center,

313 NLRB 592 (1993); Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3rd Cir. 1982); Manpower, Inc., 164 NLRB 287 (1967).

If Foam Craft is not satisfied with an AWFS employee, they will contact AWFS and the employee will be replaced either that day or the following day. Such authority also supports a finding of joint employer status. Holyoke Visiting Nurses Assn., 310 NLRB 684, 685-686 (1993), enfd. 11 F.3d 302, 306-307 (1st Cir. 1993); see also Manpower, supra, at 287-288.

Foam Craft provides time cards for AWFS employees to use. Browning, supra, at 1125 (record keeping forms supplied by employer indicia of joint employer status). Foam Craft also conducts safety meetings that AWFS employees attend. Manpower, supra, at 286-287 (attendance of safety meetings indicia of joint employer status). Once referred to Foam Craft by AWFS, AWFS employees report to a Foam Craft supervisor for assignment. Holyoke, supra, at 685-686 (listing such action as indicia of joint employer status).

A finding of joint employer status is further supported by Foam Crafts' discretionary authority to assign overtime to AWFS employees, promote/advance AWFS employees to lead positions, and make AWFS employees permanent Foam Craft employees. Such authority demonstrates the substantial effect Foam Craft has over the terms and conditions of employment of AWFS employees.

Based on the above noted considerations, it is concluded that Foam Craft and AWFS exert significant control over the AWFS employees' terms and conditions of employment so as to constitute joint employers. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (1982); Holyoke Visiting Nurses Assn., 310 NLRB 684, 685-686 (1993), enfd. 11 F.3d 302, 306-307 (1st Cir. 1993); The Brookdale Hospital Medical Center, 313 NLRB 592 (1993).

Foam Craft argues that a joint employer finding is inappropriate, contending that Foam Craft does not hire, fire, or discipline AWFS employees; that AWFS employees' functions are routine and require minimal training or supervision; and that AWFS handles paying AWFS employees (pay day, deductions from paycheck, benefits, wage rate).

Although AWFS recruits and hires the AWFS employees, determines the AWFS employees' wages, makes social security deductions from employees paychecks, and pays for the workers' compensation insurance, such facts do not preclude a finding of joint employer status. Brookdale, supra, at 592; see also Manpower, supra, at 287; Holyoke, supra, at 685-686.

Foam Craft next cites Laerco Transportation and Warehouse, 269 NLRB 324 (1984), to support its contention that because the AWFS employees' functions are routine in nature, any supervision required is minimal, thus precluding a joint employer finding. The facts in Laerco are distinguishable from the

instant facts. First, in Laerco, supervisors were frequently absent from the daily worksites of the employees. Unlike the supervisors in Laerco, Foam Craft supervisors are not absent from the Foam Craft facility. Second, unlike the supervisors in Laerco, AWFS supervisors do not resolve all major problems relating to the employment relations.[9] Third, contrary to the facts of Laerco, there is no pre-existing collective-bargaining agreement between the referring agency and its employees setting out terms and conditions of employment. Thus, the holding of Laerco does not mandate a contrary finding. See Quantum Resources Corp., 305 NLRB 759, 761 (1991).

Finally, Foam Craft cites Rawson Contractors, Inc., 302 NLRB 782 (1991), arguing that Foam Craft's inability to discipline AWFS employees supports its position that it is not a joint employer. While the power to discipline may be indicia of joint employer status, it is but one factor. The joint employer issue is factual in nature and turns upon the circumstances and relationship between the two entities. Whitewood, supra. Not only is the relationship between the two entities in Rawson distinguishable from the instant facts, as is noted above, there are additional indicia of joint employer status that exist in the instant case that were not present in the facts of Rawson. Based on the above considerations, the contentions raised by Foam Craft

[9] For example, the record reveals that employees who dispute the amount of hours that were calculated on their paycheck discuss the matter with Foam Craft human resource employee Sandra Vega.

are rejected. Accordingly, I shall direct an election in the appropriate bargaining unit of employees of the Joint Employers. There are approximately 30 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be

represented for collective-bargaining purposes by **Food, Industrial, and Beverage Warehouse Drivers and Clerical Employees Union, Local 630, International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, on or before October 20, 1999. No extension of time to file the list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices to Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to file the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

10570. This request must be received by the Board in Washington by 5 p.m., EDT, on October 27, 1999.

DATED at Los Angeles, California, this 13th day of October, 1999.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board

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440-3350-5000